Supreme Court, U.S.
FILED
05-676 NOV 22 2005
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

R.S. RADFORD
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioners

QUESTIONS PRESENTED

This Court, in *Lingle v. Chevron*, 125 S. Ct. 2074 (2005), held that a "substantially advances a legitimate state interest" test requiring courts to decide whether an ordinance furthers its objectives is not a stand alone takings test. This sort of means-ends analysis is limited to a due process claim.

Petitioners brought a takings claim under another form of the substantially advances test–one that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint. This is the cause-effect test applied in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances takings claim that requires courts to decide whether there is a close connection between the effect of a regulation and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Judicial Proceedings 5

REASONS FOR GRANTING THE WRIT 8

I. THE "SUBSTANTIALLY ADVANCES" TAKINGS ANALYSIS UPON WHICH PETITIONERS INITIALLY PREVAILED BEARS NO RESEMBLANCE TO THE TEST ANALYZED BY THIS COURT IN *LINGLE v. CHEVRON* 8

A. The Analysis Advanced by Petitioners Is Rooted in Takings Law 9

B. The *Nollan* Test Advanced by Petitioners Does Not Raise the Concerns Expressed by the Court in *Lingle* 12

II. PETITIONERS' SUCCESSFUL PRE-*LINGLE* SUBSTANTIALLY ADVANCES CLAIM SHOULD BE REMANDED AND RESOLVED AS A DUE PROCESS CLAIM 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 8-9

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 5, 14

Armstrong v. United States, 364 U.S. 40 (1960) 13

Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999) ... 5

Cashman v. City of Cotati,
374 F.3d 887 (9th Cir. 2004) 4-5, 7, 10, 15

Chevron U.S.A., Inc. v. Cayetano,
57 F. Supp. 2d 1003 (D. Haw. 1998) 4

Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th
Cir. 2000), *cert. denied*, 532 U.S. 942 (2001) 6-7

*First English Evangelical Lutheran Church v.
County of Los Angeles*, 482 U.S. 304 (1987) 12

*Hodel v. Virginia Surface Min. and Reclamation
Ass'n, Inc.*, 452 U.S. 264 (1981) 11

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 11

Lingle v. Chevron, 125 S. Ct. 2074 (2005) ... 7-8, 12, 14-15

Lucas v. Colorado Gen. Assembly,
377 U.S. 713 (1964) 13

Macri v. King County, 126 F.3d 1125 (9th Cir. 1997) 14

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 13

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 8-9, 12-13

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 11, 13

Richardson v. City and County of Honolulu,
124 F.3d 1150 (9th Cir. 1997) 4, 6, 10-12

Richardson v. City and County of Honolulu,
802 F. Supp. 326 (D. Haw. 1992) 4

Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County, 19 Cal. 4th 952 (1999) 13

Weinberg v. Whatcom County,
241 F.3d 746 (9th Cir. 2001) 5

Yee v. City of Escondido, 503 U.S. 519 (1999) 4-5, 9-10

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 5, 11

Rule

Supreme Court Rule 13.3 2

Miscellaneous

Hirsch, Werner Z. & Hirsch, Joel G., *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988) 4-5

PETITION FOR WRIT OF CERTIORARI

Gene Cashman and Eugenia Guinn respectfully petition for a writ of certiorari to review the July 15, 2005, Judgment of the Ninth Circuit Court of Appeals (Petitioners' Appendix, B) affirming the district court's judgment in favor of the City of Cotati or, alternatively, remand the case for further proceedings.

OPINIONS BELOW

The Judgment of the Ninth Circuit Court of Appeals, dated July 15, 2005 (Pet. App. A) is unpublished. The Ninth Circuit's July 15, 2005, Order granting the City of Cotati's petition for rehearing and reversing its earlier opinion (Pet. App. B), is published at 415 F.3d 1027 (9th Cir. 2005). The September 4, 2002, Judgment of the district court (Pet. App. C), adopted by the Ninth Circuit Court after its grant of Cotati's petition for rehearing, is unpublished. The Findings of Fact and Conclusions of Law (Pet. App. D), also dated September 4, 2002, are unpublished.

The Ninth Circuit's Order denying Cashman's and Guinn's petition for rehearing (Pet. App. E) is dated August 25, 2005, and is unpublished.

The Ninth Circuit's July 14, 2004, opinion before rehearing (Pet. App. F) is published at 374 F.3d 887(9th Cir. 2004). The June 21, 2000, Judgment of the district court (after summary judgment) (Pet. App. G), adopted by the Ninth Circuit Court in its July 14, 2004, opinion, is unpublished as is the June 21, 2000, Memorandum Decision and Order (Pet. App. H).

JURISDICTION

The order of the Ninth Circuit Court of Appeals was filed and entered on July 15, 2005. Pet. App. B. Petitioners Gene Cashman and Eugenia Guinn timely sought rehearing, which was denied on August 25, 2005. Pet. App. E. This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall be deprived of property without due process of law, "nor shall private property be taken for a public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

California Civil Code Section 798.56. Full text at Pet. App. I

California Civil Code Section 798.73. Full text at Pet. App. J

California Civil Code Section 798.74. Full text at Pet. App. K

Cotati, California, Ordinance No. 680 (1998), Chapter 19.14, Cotati Municipal Code. Full text at Pet. App. L.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Gene Cashman and Eugenia Guinn own two of the three mobile home parks in the City of Cotati,[1] and are subject to the provisions of Cotati's rent control ordinance. The rent control ordinance, Ordinance No. 680, limits the circumstances where Petitioners can increase rents, and it limits the amount and frequency of rent increases. (Pet. App. L-12-14, section 19.14.004; Pet. App. L-22-23, section 19.14.007; L-36-37, section 19.14.150.) Most importantly for purposes of this case, the provisions of Ordinance No. 680, in operation with California's Mobilehome Residency Law (which protects mobile home owners from actual or constructive eviction) (Pet. App. I; Pet. App. J; and Pet. App. K, section 798.74(a)) creates a situation where a valuable property interest is transferred from mobile home park owners to their lessees, the mobile home coach owners.

The valuable property interest manifests itself in the form of a monetary premium that is captured by mobile home owners when they sell their coaches. The premium represents the present value of future below-market rents; in other words, people will pay more to live in a mobile home park where regulation provides continuing below-market rents.

---

[1] A third park owner, Elizabeth White, was a plaintiff in the lawsuit, but dismissed her claims against Cotati after selling her mobile home park. Another of the original plaintiffs, Athena Sutsos, died on April 6, 2005. Her daughter and successor trustee of her living trust, Eugenia Guinn, substituted in as a party on May 31, 2005.

To avoid confusion on this point, the parties at all stages of the proceedings in this case will be referred to as Cashman and Guinn.

Premiums have been described and explained by the courts in a variety of ways: a premium is the ability to monetize the present value of the reduced ground rent by conveying a dwelling subject to a lease with a below-market rent (*see Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997)); a premium reflects the net present value of the difference between the government-controlled land rent and the free market land rent (*see id.* at 1165); and a premium captures the value of the decreased rent upon the sale of a leasehold (*Chevron U.S.A., Inc. v. Cayetano*, 57 F. Supp. 2d 1003 (D. Haw. 1998)). "The problem with rent control plans which permit the tenant to transfer his right to below-market rates is the tenant's ability to command a premium for his right." *Richardson v. City and County of Honolulu*, 802 F. Supp. 326, 337 (D. Haw. 1992) (*aff'd* in *Richardson v. City and County of Honolulu*, 124 F.3d 1150), *referencing generally*, Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988). A premium allows a one-time transfer of wealth to the tenant in possession at the time rent control is imposed, a windfall which can never be recovered by mobile home park owners or future tenants. *See Yee v. City of Escondido*, 503 U.S. 519, 530 (1999); Hirsch & Hirsch, 35 UCLA L. Rev. at 430-31.

Three conditions, in addition to government-controlled rents, are required for mobile home coach owners to capture the value of occupying spaces in rent controlled parks: a divided property interest (the owner of the land is different than the owner of the dwelling unit), the lessees' ability to transfer the right to controlled rents, and a dwelling unit that is unlikely to be moved. *See Cashman v. City of Cotati*, 374 F.3d 887, 899 (9th Cir. 2004), Pet. App. F-21. All of the conditions are present in this case. *Id.* Petitioners own the land underlying the mobile homes in their parks; the lessees own the mobile homes. *Id.* Coach owners can transfer ownership of their coaches

subject to the controlled rent. *Id.* And mobile homes, as a practical matter, are immobile, because the cost of moving a mobile home represents a significant fraction of the value of the home itself. *See Yee v. City of Escondido*, 503 U.S. at 522-23 (citing Hirsch & Hirsch, 35 UCLA L. Rev. at 405.

Mobile home park owners are forced to bear a disproportionate share of the cost of Cotati's plan to provide affordable housing to its citizens. Cotati's rent control ordinance does not provide a mechanism by which the park owners can recover any part of the property interest transferred to their lessees by the premium. *Cashman v. Cotati*, 374 F.3d at 899, Pet. App. F-21. Mobile home coach owners, on the other hand, pay below-market rents as long as they remain in a rent-controlled park, and ultimately sell their coaches for an inflated price that captures the present value of occupying a space in a park with government-controlled rents.

B. Judicial Proceedings

On July 29, 1999, park owners Cashman and Guinn, filed a lawsuit in the District Court of Northern California alleging that Ordinance No. 680 constitutes a facially invalid regulatory taking under the Fifth Amendment to the United States Constitution. Cashman and Guinn alleged causes of action for declaratory relief, violation of 42 U.S.C. § 1983, injunctive relief, and inverse condemnation.

Ninth Circuit Court of Appeals precedent did not allow Cashman and Guinn to allege a substantive due process claim. "Substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996). *See Weinberg v. Whatcom County*, 241 F.3d 746, 749 n.1 (9th Cir. 2001); and *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). When this case was filed, and throughout its

long litigation history, Ninth Circuit precedent provided that a premium-based facial attack to a rent control ordinance is properly brought as a Takings claim. *See Richardson v. City and County of Honolulu*, 124 F.3d at 1164-66.

Soon after the lawsuit was initiated, Cotati filed a motion to dismiss. The district court granted the motion, without prejudice as to the claims for damages, but denied the remainder of the motion to dismiss. Cashman and Guinn brought a motion for summary judgment, whereupon the district court, applying a substantial advancement test that examined the effect of the operative provisions of the ordinance, held that Ordinance No. 680 created an unconstitutional taking. Pet. App. H-1, 14-18. On Cotati's motion, the Court subsequently amended its judgment, and then vacated the judgment entirely after the Ninth Circuit Court ruled in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001).

The district court interpreted *Chevron USA, Inc. v. Cayetano* to require the park owners to demonstrate a likelihood that a sales premium that can be captured by mobile home park tenants prevents the ordinance from substantially advancing a legitimate state interest.

The District Court's Decision After Trial

Following a five-day bench trial, the district court entered judgment for the City of Cotati. Pet. App. C. The trial court held, in relevant part, that Ordinance No. 680 does not, on its face, constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitutions.

The court found no dispute regarding the fact that economic theory explains how Ordinance No. 680 will enable existing tenants to capitalize and sell the right to live in Cashman's and Guinn's parks at artificially depressed rents. Pet. App. D-10. But the court found that Cashman and Guinn

had not shown that the ordinance created or was likely to create premiums in coach sales prices. *Id.* at 20. The court labored under the misconception that a reasonable expectation that sales premiums will arise cannot be established by expert testimony based on economic theory. Instead, the court required that the probability that premiums will arise be proved by empirical data regarding current sales prices of mobile home coaches in Cotati. Finally, the court determined that, even if Ordinance No. 680 created a premium, that premium would not keep the ordinance from advancing its legitimate government purposes. *Id.*

Appeal to the Ninth Circuit Court

The Ninth Circuit Court of Appeals reversed the trial court decision and remanded the case to the district court to reinstate the original judgment. *Cashman v. Cotati*, 374 F.3d at 899, Pet. App. F-22. The Ninth Circuit Court determined, in relevant part, that the district court abused its discretion in amending the original judgment after petitioners' motion for summary judgment; and the district court misapplied *Chevron*, 224 F.3d 1030, when it vacated the amended judgment. *Id.*

Cotati filed a petition for rehearing, but before the Ninth Circuit Court ruled on that petition, this Court granted certiorari in *Lingle v. Chevron*, 125 S. Ct. 2074, 2077 (2005). After the decision in *Lingle* was issued, Cotati's petition for rehearing was granted, and without further briefing or argument, the court reversed its ruling, and adopted the trial court's judgment after trial. The Ninth Circuit Court explained that "[t]he Supreme Court's opinion in *Lingle* requires us to grant the City of Cotati's petition for rehearing and to withdraw our opinion." Pet. App. B-1. The court explained that Petitioners' substantially advances regulatory takings claim "is foreclosed by *Lingle*." *Id.* at 2

Cashman and Guinn filed a petition for rehearing explaining that the Ninth Circuit Court misapprehended the effect of this Court's decision in *Lingle*, and that *Lingle* did not